February 18, 2015

Via ECFS
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, D.C. 20554

Re: *Protecting and Promoting the Open Internet* (GN Dkt. No. 14-28);
Framework for Broadband Internet Service (GN Dkt. No. 10-137)

Dear Ms. Dortch:

Recent reports indicate that the Commission is poised to reverse more than 15 years' worth of precedent holding that broadband Internet access is an integrated "information service" – and that it will do so based *not* on the record compiled during an open rulemaking process satisfying the requirements of the Administrative Procedure Act ("APA"), but rather on the results of a secret process conducted by senior White House staff hidden from scrutiny or dissent, and an effort by those staff to force the Commission to change course. This approach would be flatly unlawful. Moreover, even absent this procedural irregularity, the Commission may not use its interpretive role to effectuate sweeping policy changes of the sort that would result from broadband reclassification. As the courts have made clear, such paradigm shifts may only be effectuated by Congress. The Commission therefore should reject calls for reclassification, and instead adopt a sensible policy regime founded on the Commission's established powers under Section 706 of the Telecommunications Act of 1996.[1]

1. Evidence of a Secretive White House Process to Undermine the Commission's Original Proposal and Force a Different Outcome Irrespective of the Record Renders Any Reclassification Procedurally Defective and Highly Suspect.

A February 5, 2015 article in the Wall Street Journal[2] described "an unusual, secretive effort inside the White House," beginning last spring, to disrupt the proposals set forth in the Commission's May NPRM and supplant them with a framework founded on broadband reclassification. "Acting like a parallel version of the FCC itself," and instructing staffers "not to discuss the process openly,"[3] senior White House aides developed a new plan, in consultation with activists and representatives from hand-picked Internet companies, and reflecting, among other things, requests made directly to the President during a political fundraiser. Whereas Chairman Wheeler reportedly "didn't want to regulate broadband companies in the same way that phone companies are regulated," and "wanted to leave some room for broadband providers

[1] 47 U.S.C. § 1302.

[2] Gautham Nagesh & Brody Mullins, *Blindsided: How White House Thwarted FCC Chief on Net Rules*, WALL STREET JOURNAL (Feb. 5, 2015). Also attached as ADDENDUM.

[3] *Id.*

to explore new business models," President Obama announced in November his support for reclassification and common-carriage treatment of broadband.[4] The White House effort "boxed in Mr. Wheeler," leading him ultimately to "line[] up behind Mr. Obama." The article indicates that White House staff visited with Commission leadership to express the President's view. After Chairman Wheeler announced his change of heart, a Presidential spokesperson "said … that the White House was 'encouraged to see that the FCC is heading in the same direction'" as the President.[5]

The process just described is utterly incompatible with the open debate and scrutiny required in an agency rulemaking – and, in particular, the requirement that agency decisions be founded on the official record and not based on a parallel process shielded from public scrutiny. For example, in *Home Box Office, Inc. v. FCC*,[6] the D.C. Circuit reversed certain pay cable television rules, noting that "if the Commission relied on … more candid private discussions in framing the final pay cable rules" rather than on the record before it, "then the elaborate public discussion in these dockets has been reduced to a sham." The court's language resonates strongly today, given the facts in the instant matter:

> Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those "in the know" is intolerable. Whatever the law may have been in the past, there can now be no doubt that implicit in the decision to treat the promulgation of rules as a "final" event in an ongoing process of administration is an assumption that an act of reasoned judgment has occurred, an assumption which further contemplates the existence of a body of material – documents, comments, transcripts, and statements in various forms declaring agency expertise or policy – with reference to which such judgment was exercised. Against this material, . . . it is the obligation of this court to test the actions of the Commission for arbitrariness or inconsistency with delegated authority. Yet here agency secrecy stands between us and fulfillment of our obligation…. [W]here, as here, an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly, but must treat the agency's justifications as a fictional account of

---

[4] *Id.*

[5] *Id.*

[6] 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

> the actual decision-making process and must perforce find its actions arbitrary.[7]

Similarly, in *D.C. Federation of Civic Ass'ns v. Volpe*,[8] the D.C. Circuit remanded a decision of the Secretary of Transportation on the grounds that it had been based not on statutorily mandated considerations, but rather, at least in part, on political pressure. "The [decision] is entirely the product of the action of a small group of men with strongly-held views … who, it may be assumed, are acting with the interests of the public at heart," the court held.[9] "But no matter how sound their reasoning nor how lofty their motives, they cannot usurp the function vested by Act of Congress in the Secretary of Transportation."[10] The court directed the Secretary, on remand, to "make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes."[11]

Here, the Commission's action would be *especially* vulnerable, given that any reclassification would clearly be undertaken to satisfy President Obama's request for that very result. As an independent agency, the Commission is obliged "to be independent of the Executive in [its] day-to-day operations"[12] and not subject to "coercive influence" from the President.[13] The D.C. Circuit has explained that political pressure can invalidate an agency's decision if it is "designed to force [the agency] to decide upon factors not made relevant by Congress in the applicable statute" and the decision is, indeed, "affected by those extraneous considerations."[14] Any Commission reclassification here would be based on "factors not made relevant by Congress" – namely, the majority's understanding of the President's desired rules and legal framework, separate and apart from the facts and arguments in the record. Indeed, the NPRM in this matter proposed a regime grounded in Section 706, and news reports indicated that Chairman Wheeler was opposed to full reclassification less than a week before the President's November 2014 announcing his "Plan for a Free and Open Internet." Still worse, the Commission's rules clearly require that "presentations made by … an agency or branch of the

---

[7] *Id.* at 53-56.

[8] 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972).

[9] *Id.* at 1248.

[10] *Id.*

[11] *Id.* at 1246.

[12] *Buckley v. Valeo*, 424 U.S. 1, 133 (1976).

[13] *Mistretta v. United States*, 488 U.S. 361, 411 (1989).

[14] *Sierra Club v. Costle*, 657 F.2d 298, 309-310 (D.C. Cir. 1981). *Sierra Club* addressed political pressure applied by Congress, but its principles apply equally here.

Federal Government or its staff shall be treated as *ex parte* presentations" when "the presentations are of substantial significance and clearly intended to affect the ultimate decision"[15] – yet the record here contains no mention of meetings between the White House and the Commission that were both "of substantial significance and clearly intended to affect the ultimate decision." These procedural irregularities cast a long shadow over, and ultimately would invalidate, any reclassification effort.

2. The Commission May Not Use Its Interpretive Authority to Effectuate A Massive Shift in the Regulatory Framework.

Moreover, even apart from the procedural irregularities addressed above, the abrupt reversal of a long-standing interpretation of the Communications Act would cause an enormous shift in the regulatory paradigm, dramatically expanding the Commission's own prerogatives and arrogating to the agency powers appropriately reserved to Congress. In reclassifying broadband Internet access solely to facilitate the adoption of specific rules, the Commission would be reinterpreting statutory terms to reflect not its best view of what the statute says, but merely the majority's view of what it *should* say in order to achieve political goals. This it may not do.

Title II reclassification would represent the same kind of agency arrogation of power that the Supreme Court repeatedly has struck down. For example, in 2000's *FDA v. Brown & Williamson*,[16] the Court considered whether the Food and Drug Administration ("FDA") was correct in concluding that it enjoyed authority to regulate tobacco.[17] The fact pattern is eerily similar to that here. In 1996, the FDA had reversed decades of agency precedent and asserted jurisdiction to regulate tobacco products. When proposed, these new rules were viewed to have been driven by the White House – President Clinton had initially revealed his plans for the FDA to reverse decades of agency precedent and assume regulation of tobacco products in August of 1995.[18] President Clinton expressly invited Congress legislate, suggesting a 90-day deadline for Congressional action that would expire at the end of the agency's comment period,[19] but

[15] 47 C.F.R. § 1.1206(b)(3).

[16] 529 U.S. 120 (2000).

[17] *Id.* at 131.

[18] Robert A. Rankin, *Clinton Ignites Tobacco Battle as Teen Smoking Rises, Federal Crusade Begins Cigarette Firms, Political Foes May Thwart President*, Miami Herald, Aug. 11, 1995, at 1A.

[19] Lars Noah and Barbara A. Noah, *Nicotine Withdrawal: Assessing the FDA's Effort to Regulate Tobacco Products*, 48 Ala. L. Rev. 1, 4 (1996), *citing President's Anti-Smoking Initiative Faces Formidable Challenges,* Balt. Sun, Aug. 11, 1995, at 14A.

Congress declined to act. When the FDA adopted Clinton's proposals a year later, the President unveiled the regulations during a Rose Garden ceremony.[20]

On review, the Supreme Court invalidated the FDA's interpretation. Although the statute (which defined a "drug" to include "articles (other than food) intended to affect the structure or any function of the body") appeared sufficiently broad to permit the agency's view, the Court held that the new interpretation nevertheless contradicted Congressional policy.[21] In support of its conclusion, the Court heavily emphasized the FDA's consistent statements prior to 1996 that it *lacked* jurisdiction over tobacco, and had made this position plain to Congress, which had considered and rejected bills that would have given the agency authority to regulate tobacco.[22] The Supreme Court explained that when the "FDA repeatedly informed Congress that the [statute] does not grant it the authority to regulate tobacco products, its statements were consistent with the agency's unwavering position since its inception" and that the agency's "prior position bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position."[23] The Court also found it significant that the agency changed course to "regulate an industry constituting a significant portion of the American economy."[24]

Similarly, in *MCI v. AT&T*,[25] the Supreme Court considered whether section 203(b) of the Communications Act of 1934 – which afforded the Commission discretion to modify tariff requirements – allowed the agency to permissively detariff long-distance service. The Commission had read Section 203(b) to allow such detariffing, but the Court rejected this interpretation.[26] In the Court's view, it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to

---

[20] Associated Press, *Clinton Agrees Nicotine Is Addictive; President Begins Assault on Tobacco Industry by Setting Strict Limits on Use by Minors*, Chicago Tribune, Aug. 23, 1996, at C-1 ("The emotional Rose Garden ceremony was designed to arm Clinton with a potent political weapon against Republican rival Bob Dole, who has expressed reservations about regulating tobacco.").

[21] *Id.* at 139.

[22] *Id.* at 155.

[23] *Id.* at 156.

[24] *Id.* at 159.

[25] 512 U.S. 218 (1994).

[26] *Id.* at 225.

agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[27]

The Commission's discretion is particularly limited where, as here, there is no change in relevant facts or other circumstances justifying its change in course. The courts have made clear that an agency's discretion under the "*Chevron* step two" analysis is subject to significant limitations – and that a sudden change in the agency's view of a statute is one of the circumstances triggering heightened review. For example, in 1987's *INS v. Cardoza-Fonseca*, one of the first post-*Chevron* cases to consider an agency's reinterpretation of a statutory provision, the Supreme Court declared that "an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."[28] Several years later, in *Pauley v. BethEnergy Mines*, the Court declared that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."[29] Likewise, in 1993's *Good Samaritan Hospital v. Shalala*, the Court noted that "the consistency of an agency's position is a factor in assessing the weight that position is due,"[30] and in 1994's *Thomas Jefferson University Hospital v. Shalala* it reiterated that an agency interpretation that conflicts with a prior interpretation is entitled to "considerably less deference" than a consistently held agency view.[31] And while the Court's 2009 decision in *FCC v. Fox Television Stations*[32] allows agencies to make reasoned decisions that may contradict previous ones, the Court emphasized that it was *not* changing *State Farm*'s basic message – namely, that (in the words of one commentator) "an electoral mandate does not entitle an agency to adopt or rescind a rule on the basis of a superficial analysis."[33] Here, where parties have demonstrated that broadband Internet access remains an integrated information service, and that, if anything, the service is *more* integrated than it was when the Commission first considered these issues, a decision to reclassify broadband Internet access as a telecommunications service, or as including a distinct telecommunications service component, would be subject to especially searching judicial review.

---

[27] *Id.* at 231.

[28] *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (*Watt*)).

[29] *Pauley v. BethEnergy Mines*, 501 U.S. 680, 698 (1991).

[30] *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993).

[31] 512 U.S. 504, 515 (1994).

[32] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009).

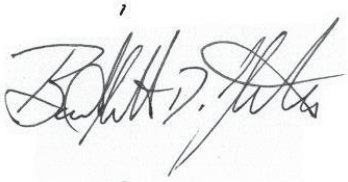
[33] Ronald M. Levin, *Hard Look Review, Policy Change, and Fox Television*, 65 U. MIAMI L. REV. 555, 571 (2011).

There are thus grave dangers inherent in any Commission effort to reclassify broadband Internet access. Like the FDA in *Brown & Williamson*, the Commission has long maintained its "information services" classification, and Congress has considered, but never adopted, bills that would have overturned that definition and/or otherwise afforded the Commission authority to adopt rules of the sort under consideration here.[34] As in *MCI*, it is "highly unlikely that Congress would leave the determination of whether [the broadband] industry will be entirely, or even substantially," regulated (not simply "rate-regulated") "to agency discretion." As in *Cardoza-Fonseca* and related cases, the agency would be changing a well-settled view, further diminishing the deference due to its decision. And here, the Commission's action will be even more vulnerable to attack (both legal and otherwise) given the appearance and reality of Presidential meddling in the affairs of a purportedly independent agency.

***

For the reasons cited above, and the many others described at length in the record, the Commission should eschew any plans to reclassify broadband Internet access as a telecommunications service or as including a severable telecommunications service component.

Sincerely,



Bartlett D. Cleland

[34] *See, e.g.*, H.R. 5252, 109th Cong. (2006); H.R. 5273, 109th Cong. (2006); H.R. 5417, 109th Cong. (2006); S. 2360, 109th Cong. (2006); S. 2686, 109th Cong. (2006); S. 2917, 109th Cong. (2006); S. 215, 110th Cong. (2007); H.R. 5353, 110th Cong. (2008); H.R. 5994, 110th Cong. (2008); H.R. 3458, 111th Cong. (2009); S. 74,

112th Cong. (2011).

ADDENDUM

LEXIS-NEXIS

The Wall Street Journal

February 5, 2015 Thursday

SECTION: Pg. A1

LENGTH: 1901 words

HEADLINE: Blindsided: How White House Thwarted FCC Chief on Net Rules

BYLINE: By Gautham Nagesh and Brody Mullins

BODY:
WASHINGTON -- In November, the White House's top economic adviser dropped by the Federal Communications Commission with a heads-up for the agency's chairman, Tom Wheeler. President Barack Obama was ready to unveil his vision for regulating high-speed Internet traffic. The specifics came four days later in an announcement that blindsided officials at the FCC. Mr. Obama said the Internet should be overseen as a public utility, with the "strongest possible rules" forcing broadband providers such as AT&T Inc. and Verizon Communications Inc. to treat all Internet traffic equally.

The president's words swept aside more than a decade of light-touch regulation of the Internet and months of work by Mr. Wheeler toward a compromise. On Wednesday, Mr. Wheeler lined up behind Mr. Obama, announcing proposed rules to ensure that the Internet "remains open, now and in the future, for all Americans," according to an op-ed by Mr. Wheeler in Wired.

The prod from Mr. Obama came after an unusual, secretive effort inside the White House, led by two aides who built a case for the principle known as "net neutrality" through dozens of meetings with online activists, Web startups and traditional telecommunications companies.

Acting like a parallel version of the FCC itself, R. David Edelman and Tom Power listened as Etsy Inc., Kickstarter Inc., Yahoo Inc.'s Tumblr and other companies insisted that utility-like rules were needed to help small companies and entrepreneurs compete online, people involved in the process say.

In an office on the fourth floor of the Old Executive Office Building, some companies claimed they would have never gotten off the ground if they had been forced to pay broadband providers. "We want to compete on product and service, not on our ability to negotiate preferable treatment with an Internet service provider," said David Pashman, general counsel for Meetup Inc.

The big losers in the White House process were cable and phone companies, which spent years lobbying to gain support for their view that toughened rules would make it harder for them to offer new kinds of services. Executives who tried to go over the two aides' heads, including by appealing directly to Valerie Jarrett, Mr. Obama's senior adviser, got nowhere.

Mr. Wheeler wasn't available for comment Wednesday. Senior FCC officials say he was always open to shifting his position and became convinced that the tougher stance advocated by Mr. Obama wouldn't discourage broadband companies from upgrading their networks.

White House spokesman Josh Earnest said Wednesday that the White House was "encouraged to see that the FCC is heading in the same direction of safeguarding net neutrality with the strongest possible protections." He added: "This is consistent with the view that the president articulated back in the fall."

While Mr. Obama's position stunned officials at the FCC, he wanted to push for strong rules ensuring net neutrality right after his 2008 election over Sen. John McCain (R., Ariz.). The FCC's chairman at the time, Julius Genachowski, supported Mr. Obama and aimed to write strong rules preventing broadband providers from making some websites work faster than others for fees.

But Larry Summers, then the Obama administration's chief economic adviser, and other officials urged the president to focus his attention on the turbulent economy, former White House officials say.

"I've always supported net neutrality, but I have been very concerned and remain very concerned about overly heavy-handed approaches to net neutrality that I believe could choke off substantial

volumes of productive investment to the detriment of American economic growth," Mr. Summers says.

Mr. Genachowski went ahead with FCC rules that were weaker than those proposed Wednesday, but they were thrown out in January 2014 by a federal appeals court. The court said the FCC couldn't impose the rules because it had explicitly decided previously not to classify broadband as a telecom service.

The ruling sent the question of how to regulate the Internet back to the FCC, where Mr. Wheeler became chairman in November 2013. The former cable- and wireless-industry lobbyist sought a compromise.

People familiar with his thinking say he didn't want to regulate broadband companies in the same way that phone companies are regulated. Mr. Wheeler also wanted to leave some room for broadband providers to explore new business models, including accepting payments from content providers. That could allow broadband companies to offer free or cheap services.

Broadband companies generally liked the FCC chairman's approach, but net-neutrality die-hards quickly started mobilizing against it. Last April, Marvin Ammori, a lawyer who advises startups and Web companies, warned in a meeting at Tumblr's headquarters in the Flatiron District of New York City that Internet regulation was a do-or-die necessity for small firms.

The FCC soon proposed rules allowing broadband providers to charge companies a premium for access to their fastest lanes, as long as such arrangements are available on "commercially reasonable" terms for all interested content companies. "Commercially reasonable" would be decided by the FCC on a case-by-case basis.

Officials at some Internet startup companies decided they had to fight the proposal but didn't know where to start. Mr. Ammori recalls that some officials asked if they needed to register as lobbyists to meet with regulators and lawmakers. They didn't. Mr. Wheeler resisted stronger rules.

At the same time, Mr. Ammori tried to build wider public support for net neutrality. Last May, he spoke with a researcher for "Last Week Tonight with John Oliver," the HBO comedy series. On June 1, Mr. Oliver unleashed a 13-minute rant in an episode of the show, comparing Mr. Wheeler to a dingo and encouraging viewers to bombard the FCC with comments.

The deluge crashed the FCC's online comment system. Overall, the agency got more than four million comments on last year's rule proposal.

Mr. Wheeler was open-minded about the concerns of online activists and Web startups, people close to him recall, holding meetings in Silicon Valley and New York to hear objections to his plan to allow some preferential treatment for Internet traffic.

Before one meeting, Mr. Ammori advised technology executives to share personal stories of how an open Internet helped them create their companies. They were discouraged when the FCC chairman opened the meeting with a sales pitch on his approach and why it would protect net neutrality, according to people who attended the meeting.

Mr. Wheeler ran into stiff resistance at a July 2014 meeting at the New York office of online crafts marketplace Etsy. Before the meeting, Mr. Ammori wrote a 10-page memo detailing the legal arguments against Mr. Wheeler's approach -- and gave copies to executives set to meet with him.

In a lucky coincidence, Tumblr Chief Executive David Karp, who attended the meeting in New York, found himself seated next to Mr. Obama at a fundraiser the following day hosted by investment manager Deven Parekh.

Mr. Karp told Mr. Obama about his concerns with the net-neutrality plan backed by Mr. Wheeler, according to people familiar with the conversation. Those objections were relayed to the White House aides secretly working on an alternative.

Mr. Edelman, who turned 30 years old on Wednesday, had previously spent four years at the State Department, starting as an analyst specializing in northeast Asia, and was finishing his doctorate in international relations from Oxford University. Mr. Power is a longtime telecom lawyer and White House official who took his first job at the FCC in the 1990s.

Messrs. Edelman and Power started working on the White House plan last spring. As their work progressed, aides began summarizing the arguments for net neutrality in allegorical terms. For example, the White House aides said, imagine calling the operator for a phone number for car-rental company Avis and being asked whether you would prefer Hertz.

Officials told participants not to discuss the process openly.

A generational shift, including the departure of Mr. Summers, left behind a younger, tech-savvy staff inclined to favor Web companies over telecommunications firms. Senior White House officials like Jeffrey Zients, director of the National Economic Council, were primarily concerned about the potential economic impact of changing the rules.

As rumors swirled last fall that Mr. Obama was preparing to call for tougher Internet regulations, Comcast Corp. CEO Brian Roberts called Ms. Jarrett, pressed her for information and urged the White House not to go through with the move, people familiar with the matter say.

She offered no help, these people say. Google Inc. Executive Chairman Eric Schmidt spoke with White House officials, urging them not to go through with utility-like rules.

Google, Facebook Inc. and other large Internet companies expressed support for net neutrality through the Internet Association, a trade group, but were largely on the sidelines during the White House process.

On Oct. 21, the White House invited chief executives of Tumblr, Etsy, Kickstarter, and IAC/InterActive Corp.'s Vimeo video platform to the West Wing for a meeting with Mr. Zients, top White House economist Jason Furman and other senior aides.

For more than an hour, White House officials questioned the CEOs gathered in the Roosevelt Room about why net neutrality was so important to them, according to people who attended the meeting.

Chad Dickerson, Etsy's chief executive, replied that nearly nine of every 10 Etsy sellers are women, many earning a living from selling on the website. Kickstarter and Tumblr executives said treating Internet traffic equally was crucial to thousands of people who built businesses on their platforms.

While Obama administration officials were warming to the idea of calling for tougher rules, it took the November elections to sway Mr. Obama into action.

After Republicans gained their Senate majority, Mr. Obama took a number of actions to go around Congress, including a unilateral move to ease immigration rules. Senior aides also began looking for issues that would help define the president's legacy. Net neutrality seemed like a good fit.

Soon, Mr. Zients paid his visit to the FCC to let Mr. Wheeler know the president would make a statement on high-speed Internet regulation. Messrs. Zients and Wheeler didn't discuss the details, according to Mr. Wheeler.

Mr. Obama made them clear in a 1,062-word statement and two-minute video. He told the FCC to regulate mobile and fixed broadband providers more strictly and enact strong rules to prevent those providers from altering download speeds for specific websites or services.

In the video, Mr. Obama said his stance was confirmation of a long-standing commitment to net neutrality. The statement boxed in Mr. Wheeler by giving the FCC's two other Democratic commissioners cover to vote against anything falling short of Mr. Obama's position.

That essentially killed the compromise proposed by Mr. Wheeler, leaving him no choice but to follow the path outlined by the president.

In his op-ed Wednesday, Mr. Wheeler wrote: "I am submitting to my colleagues the strongest open Internet protections ever proposed by the FCC."

(See related article: "FCC Proposes Tighter Rein On Broadband" -- WSJ Feb. 5, 2015)

NOTES:
PUBLISHER: Dow Jones & Company, Inc.

LOAD-DATE: February 6, 2015